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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 938

MONOLITH PORTLAND CEMENT CO., *Petitioner*,

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, LOS ANGELES DISTRICT, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH T. ENRIGHT
NORMAN ELLIOTT
541 South Spring Street
Los Angeles, California 90013

WILLIAM A. SUTHERLAND
JEROME B. LIBIN
900 - 17th Street, N.W.
Washington, D. C. 20006

Counsel for Petitioner.

Of Counsel:

ENRIGHT, ELLIOTT & BETZ
541 South Spring Street
Los Angeles, California 90013

SUTHERLAND, ASBILL & BRENNAN
900 - 17th Street, N.W.
Washington, D. C. 20006

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Monolith Portland Cement Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on August 22, 1964 (R. 866).

OPINIONS BELOW

The District Court issued no opinion; its findings of fact, conclusions of law and judgment dismissing petitioner's complaint for refund of income taxes paid (R. 828-31) are unreported. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix B hereto, *infra,* p. 2a, is reported at 336 F. 2d 402.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1964 (R. 866; App. C, *infra*, p. 10a). A petition for rehearing and rehearing en banc was denied without opinion on October 1, 1964 (R. 867). By order of Mr. Justice White, entered on December 17, 1964, the time for filing a petition for a writ of certiorari was extended to February 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Are questions which are present in a case, but which are neither presented for review in a petition for certiorari, nor fairly comprised therein, automatically foreclosed from consideration by the lower courts on remand of the case by this Court under a mandate providing "for further proceedings" in conformity with this Court's per curiam opinion?

RULES INVOLVED

The principal rule involved is Rule 23 of this Court's Revised Rules, 28 U.S.C.A., which provides in pertinent part:

> "Rule 23. The petition for certiorari.
>
> "1. The petition for writ of certiorari shall contain in the order here indicated—
>
> * * * *
>
> "(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

STATEMENT

The question presented by this petition is purely procedural in nature. It involves only the proper interpretation of this Court's mandate. However, in order to understand fully the context in which the question arises, it is necessary that the background facts be set forth.

In 1951, petitioner mined limestone from its own quarry and manufactured it into cement. After computing its percentage depletion allowance for Federal income tax purposes by using the kiln-feed stage as its depletion base, petitioner filed a claim for refund of income taxes paid, and. after the denial of its claim, commenced a refund action in which it contended that since its type of limestone was not salable in crude form, finished cement was its first "commercially marketable mineral product" under the applicable statute and hence its proper depletion base. The District Court agreed, *Monolith Portland Cement Co.* v. *United States,* 168 F. Supp. 692 (S D. Cal. 1958), and the Ninth Circuit affirmed, 269 F. 2d 629.

For the taxable year 1952, petitioner followed the same procedure as it had in 1951 and upon denial of its claim for refund brought the instant action, claiming that the doctrines of res judicata and collateral estoppel required a holding in its favor for the taxable year 1952, and that even in the absence of res judicata or collateral estoppel it was, under a proper interpretation of the applicable statute, entitled to use finished cement as its depletion base.[1]

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[1] As authority, petitioner cited *Dragon Cement Co.* v. *United States*, 244 F. 2d 512 (1st Cir. 1957), cert. den. 355 U.S. 833, and the first *Monolith* case, *supra.*

The District Court ruled that res judicata and collateral estoppel foreclosed the relitigation of certain questions of fact pivotal to the Government's defense. But preferring not to rest on those grounds alone, the District Court also decided the question of statutory construction, and again ruled in petitioner's favor.

While the Government's appeal was pending, this Court decided *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960), involving the proper depletion base for fire clay and shale. This Court there held that since substantial amounts of raw fire clay and shale were actually and customarily sold in Cannelton's local market, the crude mineral products themselves constituted Cannelton's proper depletion base.

But this Court there expressly distinguished certain Courts of Appeals decisions that had allowed a finished product depletion base where it had been found, as in the *Dragon Cement* and first *Monolith* cases, that the product of the mines involved was not salable in the form of a crude mineral product. (364 U.S. 76, 89.)[2]

For several years prior to the decision in *Cannelton*, the Administration had asked Congress to "revise the law" allowing a cement depletion base for non-salable

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[2] While this Court's opinion does not expressly list all of the Courts of Appeals decisions that it considered distinguishable, it is clear from the language used, as well as from the briefs filed, that the *Dragon Cement* case was among those cases that this Court deemed distinguishable. (See Brief for Respondent, *United States* v. *Cannelton Sewer Pipe Co.*, *supra*, pp. 42 et seq.) The first *Monolith* case, while not cited in Cannelton's brief, followed the decision in *Dragon Cement* and is clearly a part of the same line of cases.

cement-type limestone,[3] but no action was taken. Then, following the *Cannelton* decision, Congress in the Act of September 14, 1960 enacted legislation providing for a mandatory kiln-feed (rather than crude mineral product) depletion base for post-1960 years, and requiring cement producers to make an irrevocable election by November 1960 between a kiln-feed base and "existing law" for all open prior tax years.

Relying upon the *Dragon Cement* and first *Monolith* cases and this Court's refusal in *Cannelton* to disapprove such cases as being declarative of "existing law," as well as upon the District Court's res judicata and collateral estoppel findings in the instant case, petitioner elected an "existing law" depletion base for its 1952-1960 tax years, and continued the instant action for a refund of taxes based upon the difference between a kiln-feed depletion base and a cement depletion base.

It was in this context that the instant case first reached the Court of Appeals for the Ninth Circuit. That Court, after noting that this Court in *Cannelton* had treated the cement cases as "distinguishable," affirmed the District Court's holding that petitioner was entitled to a cement depletion base for 1952.

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[3] Following this Court's denial of certiorari in the *Dragon Cement* case, *supra*, cert. den. 355 U.S. 833, and the 13 cases consolidated as *United States* v. *Merry Brothers Brick & Tile Company, et al.*, 242 F. 2d 708, cert. den. 355 U.S. 824, two budget messages to Congress as well as the testimony of the Secretary of the Treasury referred to the asserted need to "revise the law" allowing a cement depletion base. See S. Rep. 903, 87th Cong., 1st Sess. pp. 4-5 (1961); H. Rep. 939, 87th Cong., 1st Sess. pp. 4-5 (1961).

(*Riddell* v. *Monolith Portland Cement Co.*, 301 F. 2d 488.) The Court of Appeals further indicated that since petitioner, in making its statutory election and in shaping its tax and financial affairs, had in good faith relied upon cases such as the *Dragon Cement* and first *Monolith* cases as constituting "existing law" approving a cement depletion base, a different rule should not now be applied retroactively to its detriment. (301 F. 2d 488, 497.) Finally, the Court of Appeals indicated that although it "might well agree" with the District Court's finding that res judicata and collateral estoppel also barred consideration of the Government's contentions, it preferred to decide the case "on the merits," that is, simply on a construction of § 114(b)(4)(B) as applied to cement manufacturers generally. (301 F. 2d 488, 498.)

The Government then petitioned this Court for certiorari. It chose to limit its "Question Presented" to a single question of statutory construction, as follows:

> "Whether, for the purpose of computing the percentage depletion allowance on limestone, 'mining' as defined in Section 114(b)(4)(B) of the Internal Revenue Code of 1939, includes the processes employed by an integrated miner-manufacturer to manufacture cement". (Govt. Pet. Cert. p. 2).

Notwithstanding that other issues had appealed to the courts below as possible alternative bases for a decision in petitioner's favor, the Government did not ask this Court to consider any of those issues. Indeed,

its only reference to any other such issues was in a footnote.[4]

In the body of its petition the Government addressed itself only to the statutory construction question, and contended primarily that the Ninth Circuit had erred in failing to hold that the principles of the *Cannelton* case applied generally to cement producers. It requested that this Court reverse the judgment below and remand the case for disposition in accordance with *Cannelton*. Petitioner's brief in opposition presented several reasons why the Government's petition should be denied.

This Court granted the Government's petition, and, without hearing argument, issued a short per curiam

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[4] The Government's footnote read as follows:

> "There have been two other issues in the case. The 'marble' issue raised by the Government in the trial court as an additional defense, is not raised in this petition. A collateral estoppel issue was raised by the taxpayer in relation to both of the other issues, but both courts below preferred to rest their decisions on the merits. (R. 169-170; App. A, *infra*, p. 39.) In view of this Court's subsequent decision in *Cannelton*, collateral estoppel clearly does not apply to the issue presented on this petition. See *Commissioner* v. *Sunnen*, 333 U.S. 591." (Govt. Pet. Cert. p. 3, n. 2.)

As can be seen, there was no mention of any kind of the Court of Appeals' statement, made *after* the *Cannelton* decision, that it "might well agree" that collateral estoppel *was* applicable. (301 F. 2d 488, 498.) Nor did the Government make any mention whatsoever of the "prospective only" and "existing law" issues, *i.e.*, petitioner's arguments in the court below that the theory of the *Cannelton* case should not be applied retroactively to the detriment of cement manufacturers generally, particularly in light of Congressional understanding of "existing law" at the time of enactment of the Act of September 14, 1960, arguments with which the Court of Appeals had also intimated agreement. (301 F. 2d 488, 497.)

opinion which answered the statutory construction question in the Government's favor on the authority of *Cannelton,* thus reversing the decision of the Court of Appeals. (371 U.S. 537.) However, there was not a single word in this Court's per curiam opinion which dealt with any other issue in the case. Petitioner filed a petition for rehearing, seeking assurance that the case would be remanded for further proceedings. Although the petition was denied (372 U.S. 832), this Court remanded the case to the District Court under a mandate calling "for further proceedings in conformity with the opinion of this Court." (R. 773; App. A, *infra,* p. 1a.)

Following the remand, no hearing of any kind was ever held in the District Court. Instead, by minute order made and entered without prior notice, the District Court ordered this Court's mandate spread upon the record (R. 746), called for new findings, conclusions and judgment (R. 746), considered proposed findings in chambers, rejected those proposed by petitioner (R. 803), vacated all prior findings (R. 828), adopted new findings and conclusions on the statutory construction point only (R. 828-831), and entered the Government's suggested judgment of dismissal of petitioner's complaint (R. 831), *all without a hearing.*

Petitioner appealed, urging that, since this Court's opinion was authority only for the single question of statutory construction actually presented to it for consideration and decision, petitioner was entitled to a hearing and decision on the remaining issues and questions which, *notwithstanding this Court's decision,* were still present in the case. Petitioner asserted that dismissal of its complaint without a hearing and decision on such questions was plainly a misconstruction

of this Court's opinion and mandate under this Court's own rules and decisions and was grossly unfair. The Court of Appeals, however, affirmed the District Court's dismissal of petitioner's complaint, concluding that this Court had itself considered and "rejected" *every* argument on which petitioner sought to be heard below. (336 F. 2d 402; App. B, *infra*, p. 2a.)

REASONS FOR GRANTING THE WRIT

In grossly misconstruing this Court's prior mandate by affirming the District Court's dismissal of petitioner's complaint, without affording petitioner a hearing and decision on the remaining issues in the case, the action of the Court of Appeals involves a clear disregard of this Court's certiorari practice, is in conflict with this Court's own rules and decisions, as well as with a decision of the Court of Appeals for the District of Columbia Circuit, and constitutes clear error requiring the invocation of this Court's supervisory power over the actions of lower federal courts.

Rule 23 of this Court's Revised Rules sets forth the rules governing the filing of a petition for certiorari. Paragraph 1(c) of Rule 23 states that the petition for certiorari shall contain, among other things—

> "The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the petition or fairly comprised therein will be considered by the court.*" (Rules of Supreme Court, 28 U.S.C.A.) (Emphasis supplied.)

In its petition for certiorari in the prior proceeding in this Court, the Government elected to limit its

"Question Presented" to a single question of statutory construction, framed as follows:

> "Whether, for the purpose of computing the percentage depletion allowance on limestone, 'mining,' as defined in Section 114(b)(4)(B) of the Internal Revenue Code of 1939, includes the processes employed by an integrated miner-manufacturer to manufacture cement." (Govt. Pet. Cert. p. 2.)

No other question was presented for consideration. This Court answered the single question thus presented by ruling in its per curiam opinion that § 114(b)(4)(B) is to be construed to limit petitioner's depletion base to its constructive income from crushed limestone, rather than from finished cement. (371 U.S. 537, 539.) *No other question was decided,* and the case was remanded to the District Court under a mandate calling "for further proceedings in conformity with the opinion of this Court." (R. 773; App. A, *infra,* p. 1a.) It was thus plainly contemplated that further proceedings would be held.

On remand, and in accordance with this Court's mandate, therefore, petitioner clearly was entitled to a hearing and decision on the remaining issues in its case —*issues that were neither subsidiary to the single question of statutory construction which had been presented to this Court, nor "fairly comprised therein."* As has been indicated, the remaining issues on which petitioner sought a hearing and decision included the question whether, under the circumstances here present, a decision as significant and far-reaching as this Court's decision in the *Cannelton Sewer Pipe* case should be applied prospectively only with respect to cement manufacturers (cf. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358), and the

question whether res judicata and collateral estoppel should apply to this case, notwithstanding this Court's *Cannelton* decision.

As can be seen, the foregoing issues are wholly non-statutory in nature, and go entirely to the question whether, *notwithstanding this Court's interpretation of the applicable statutory provision,* this taxpayer might nevertheless be entitled to a favorable decision on other grounds. *Neither of these issues was presented to this Court for consideration by the Government in its petition for certiorari.* Indeed, as has been shown, the Government ignored completely petitioner's arguments on the "prospective-only" and "existing law" points, and disclaimed the existence of the "collateral estoppel" issue in a footnote in which it expressed the view that collateral estoppel "clearly does not apply," even though the Court of Appeals had previously indicated, after the *Cannelton* decision, that it "might well agree" with petitioner that collateral estoppel *does* apply.

Since both lower courts had previously chosen to rest their decisions primarily on a favorable interpretation of the applicable statute, although recognizing merit in petitioner's remaining arguments, it was not until *after* this Court's per curiam summary reversal on the statutory construction point that the remaining issues assumed real significance. Yet, it was at this very point that both lower courts refused to hear and decide these issues.

As has been shown, the District Court vacated all of its prior findings and conclusions, and issued new findings and conclusions on the statutory construction point only. It then entered judgment dismissing petitioner's action.

On appeal, the Ninth Circuit affirmed the District Court's action on utterly untenable grounds. Without citing any authority whatsoever, the Court of Appeals asserted that this Court previously had before it a "case or controversy" which included each and every issue in the case. Though it acknowledged that *only* the statutory construction issue had actually been presented to this Court in the Government's petition for certiorari, the Ninth Circuit nevertheless noted that the other issues in the case had been called to this Court's attention in petitioner's brief in opposition to the Government's petition, and again in petitioner's petition for rehearing. The Court of Appeals then concluded that, in light of the foregoing, the other issues in the case somehow had been considered and "rejected" by this Court, and thus were foreclosed from further consideration on remand. The Ninth Circuit's affirmance of the District Court's action thus rested, not on an evaluation of the merits of the other issues in the case, but on the indefensible ground that this Court had "rejected" all issues in the case—*including issues which had not even been presented to it for consideration as required by Rule 23.*

The basis for the Court of Appeals' decision is so glaringly erroneous as to require little comment. This Court's certiorari practice is not geared to the abstract concept of a "case or controversy." Rule 23 plainly and unmistakably provides that, "Only the questions set forth in the petition or fairly comprised therein will be considered by the Court." The *only* question set forth in the Government's petition for certiorari was a question of statutory construction, and under Rule 23 *only* that question could properly have been decided.

This Court has consistently declared that its certiorari review is strictly limited to the "questions presented" in the petition. As was stated in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 179:

> "One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue. *Crown Cork & Seal Co.* v. *Gutmann Co., ante,* p. 159. Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ."

See also, *Helis* v. *Ward,* 308 U.S. 365, 370; *Irvine* v. *California,* 347 U.S. 128, 129.

Moreover, as this Court recently held in *Namet* v. *United States,* 373 U.S. 179, where an issue is brought to this Court's attention in papers filed in reply to a petition for certiorari, "under our rules it is not before us." (373 U.S. 179, 190.) The reason for this is clear. The function of a brief in opposition to a petition for certiorari is, under Rule 24 of this Court's rules, merely to disclose "any matter or ground why the cause should not be reviewed by this Court." (Supreme Court Rule 24.1, 28 U.S.C.A.) A brief in opposition, therefore, cannot of itself place additional issues before this Court for consideration on their merits.

That is not to say that this Court lacks the power, in cases where it deems it appropriate, to *affirm* a judgment below on the basis of issues other than that presented in the petition, which have been called to its attention by the respondent. (See, for example, *Langnes* v. *Green,* 282 U.S. 531; *United States* v. *Carignan,* 342 U.S. 36.) But those cases afford no basis whatever for assuming, as the Court of Appeals here

assumed, that matters mentioned in a brief in opposition *must have been considered and rejected* by this Court when it summarily *reverses and remands* a decision that had been based on *only one of several possible grounds.* And there is *no case* that affords any basis whatever for the assumption indulged in by the Court of Appeals, where, as here, the opinion of this Court was clearly confined to answering the single question presented in the petition and contained no reference of any kind to the other matters mentioned in the brief in opposition, and where, as here, there is no indication of any kind that such other matters had even been recognized by the Court, much less considered and decided. Had this Court intended to consider and decide any issue other than that presented by the Government, it surely would have said so.

Accordingly, since this Court's rules clearly set forth the limited function of a brief in opposition, and since the *Namet* case, *supra,* squarely holds, with respect to an issue raised in reply to a petition for certiorari, that "under our rules it is not before us," the Ninth Circuit's conclusion that this Court must have "rejected" the remaining issues in the case merely because they had been mentioned in the brief in opposition is not only completely lacking in authority, but is in direct conflict with this Court's own rules and decisions.

Further, the Ninth Circuit's reliance upon this Court's denial of petitioner's petition for rehearing merely serves to compound its basic error. Since this Court has long admonished that the denial of a petition for certiorari "imports no expression of opinion upon the merits of a case" (*House* v. *Mayo,* 324 U.S. 42, 48), it is true *a fortiori* that the denial of a petition

for rehearing "imports no expression of opinion upon the merits" of issues which were never properly before this Court. As a matter of fact, the petition for rehearing did not even seek a decision by this Court on the other issues; it merely sought to have it made clear that on remand those issues not passed upon by this Court would be open for decision below. And this Court's mandate so provided.

Finally, in holding that on remand the remaining issues in the case were not open for hearing and decision, the Court of Appeals placed itself in direct conflict with the Court of Appeals for the District of Columbia Circuit. In *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F.2d 314 (D.C. Cir. 1958), that Court of Appeals, in an opinion by Judge Prettyman, [redacted] held that this Court's reversal and remand of a case which presented only certain issues for review does not foreclose consideration of other issues in the case upon remand. Rather, the Court held, on remand the lower courts *must* reconsider all remaining issues in the case. As the Court stated:

> "Rule 23(c) of the Rules of the Supreme Court, 28 U.S.C.A., provides for a statement of the questions presented for review. It provides that the statement of a question will be deemed to include every subsidiary question 'fairly comprised therein' and that only such questions will be considered by the Court. But that seems to us not to be a basis for concluding that all questions not stated or 'fairly comprised' in a statement are abandoned. To be sure, if a judgment is affirmed by the Supreme Court, all questions presented and all which might have been presented are *res judicata. But, if the judgment is reversed or va-*

> *cated on a single point (e.g., a constitutional question and the only point presented to the Court), other claims of error are not foreclosed upon a retrial or reconsideration upon a general remand.*" (254 F.2d 314, 321.) (Emphasis supplied.)

The Court went ahead to explain the significance of a remand "for further proceedings"—the precise language of this Court's mandate in the instant case—as follows:

> "Of course, if the Supreme Court reverses and directs that a certain final judgment be entered, the whole controversy is ended. *We are here considering a reversal or vacation with a remand, as, for example, 'for further proceedings in accordance with this opinion.' Such a remand, or a general unqualified remand, means that the appellate court and trial court are to reconsider the case on all other points.* Those points remain open after the Supreme Court's disposition of the case before it. * * * *If this were not so, almost every petition to the Supreme Court would be burdened with a plethora of 'questions presented' in which the Court has no interest and should have none.*" (254 F.2d 314, 321-322.) (Emphasis supplied.)

Significantly, in the *Communist Party* case it was the petitioner in this Court who, although victorious here, sought and obtained further consideration of certain remaining issues on remand. If a petitioner can pick and choose the questions to be presented for review by this Court without losing its right to be heard on other issues on remand, it seems clear beyond doubt that a *respondent* in this Court has not lost *its* right to be heard on the remaining issues in a case where this Court has ruled for the petitioner solely on the single question presented by the petition and has remanded the case "for further proceedings." Accordingly, in denying petitioner a hearing and decision on

the remaining issues in the instant case, the decision below is in direct conflict with the holding of the District of Columbia Circuit in the *Communist Party* case.

Whatever the reasons behind the Government's action in here asking this Court to consider *only* the statutory construction question, the effect of that action necessarily was *to leave the remaining issues in the case for further consideration on remand.* It is absolutely essential that this be the rule. Otherwise, lower courts could deny a respondent a hearing on remand merely by assuming that a reversal by this Court *must* have involved a decision on every point mentioned by the respondent, even though this Court's opinion does not so indicate, and even though the *Namet* case and this Court's own rules provide otherwise. No lower court should be permitted so cavalierly to deprive a respondent of its right to a hearing on the remaining issues in a case.

However this Court might have decided the remaining issues in the case had it chosen to consider them, the fact is it did not. Yet, if the decision below is permitted to stand, its effect will be to require this Court, in order to prevent the unconscionable result described above, to state specifically in each case what has heretofore been considered obvious—that this Court did not in fact decide issues which under its own rules it was not required to consider, and which were not even mentioned in its opinion.

Whether or not petitioner might prevail on the remaining issues in the lower courts is not here a matter of proper concern. Indeed, inasmuch as petitioner here claims only the right to obtain a hearing and decision on those issues, it would be grossly improper for either party to consume the time of this Court debating their

merits at this stage of the proceedings. All petitioner seeks is the invocation of this Court's supervisory power to correct the unjustified and unsupportable action of the court below in ignoring this Court's own mandate, rules and decisions, as well as the decision of the Court of Appeals for the District of Columbia Circuit, and in thus departing from the accepted and usual course of judicial proceedings.

CONCLUSION

For the reasons stated, and since no hearing would appear to be necessary, this petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded to the District Court for further proceedings which would permit a full consideration of the remaining issues in the case.

Respectfully submitted,

JOSEPH T. ENRIGHT
NORMAN ELLIOTT
541 South Spring Street
Los Angeles, California 90013

WILLIAM A. SUTHERLAND
JEROME B. LIBIN
900-17th Street, N.W.
Washington, D. C. 20006

Counsel for Petitioner.

Of Counsel:

ENRIGHT, ELLIOTT & BETZ
541 South Spring Street
Los Angeles, California 90013

SUTHERLAND, ASBILL & BRENNAN
900-17th Street, N.W.
Washington, D. C. 20006

APPENDIX A

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 528

R. A. RIDDELL, District Director of Internal Revenue, Los Angeles District, *Petitioner*,

v.

MONOLITH PORTLAND CEMENT CO.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Ninth Circuit.

On Consideration Whereof, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of California for further proceedings in conformity with the opinion of this Court.

January 14, 1963

[Seal]

Test: /s/JOHN N. DAVIS
Clerk of the Supreme Court of the United States.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,505

UNITED STATES OF AMERICA, *Appellant*,

v.

MONOLITH PORTLAND MIDWEST COMPANY, *Appellee*.

No. 18,776

MONOLITH PORTLAND CEMENT COMPANY, *Appellant*,

v.

R. A. RIDDELL, District Director of Internal Revenue, Los Angeles District, *Appellee*.

[Aug. 22, 1964]

Appeals from the United States District Court for the Southern District of California
Central Division

Before: BARNES and JERTBERG, Circuit Judges; and McNICHOLS, District Judge

BARNES, Circuit Judge:

Two actions have been consolidated on appeal because of common questions of law and fact. In No. 18505 the government appeals from a judgment for Monolith Portland Midwest Company (hereinafter referred to sometimes as Midwest) denying income taxes for the taxable years 1951 and 1952. In No. 18776 Monolith Portland Cement Company (hereinafter referred to sometimes as Monolith) appeals from a judgment for the government as to income taxes for the taxable year 1952.

The district court had jurisdiction of the causes pursuant to 28 U.S.C. §§ 1345 and 1346. This court has jurisdiction of the appeals under 28 U.S.C. § 1291.

The controversies in both cases rest upon one real issue: what "cut off point" in the taxpayers' integrated processes of changing mined limestone to manufactured cement must the taxpayers use to determine its value for purposes of determining their depletion allowances under Sections 23 and 114(b) of the Internal Revenue Code of 1939? In Monolith the district court, pursuant to a Supreme Court mandate, held that the cut-off point was after the limestone was crushed. Originally the district court had held for the taxpayer on the ground that the cut-off point was at the finished bulk cement stage. This court had affirmed. *Riddell* v. *Monolith Portland Cement Co.*, 1962, 301 F. 2d 488. But the Supreme Court reversed on the authority of *U.S.A.* v. *Cannelton Sewer Pipe Co.*, 1960, 364 U.S. 76. (*Riddell* v. *Monolith Portland Cement Co.*, 1963, 371 U.S. 537, reh. den. 372 U.S. 832.) On remand the district court then held for the government. Monolith now appeals.

In Midwest, the district court held that the cut-off point was after the cement was finished and ready for market.

The Legal Background

In 1951 and 1952 Section 114(b)(4)(B) of the 1939 Code provided:

> "As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining' as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and

so much of the transportation . . . . The term 'ordinary treatment processes,' as used herein, shall include the following: . . . (iii) in the case of . . . minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering . . . and loading . . . (iv) in the case of . . . ores which are not customarily sold in the form of the crude mineral product—crushing, grinding . . . ."

On June 27, 1960 the Supreme Court held in *Cannelton, supra,* that the cut-off point for an integrated miner-manufacturer of fire clay-sewer pipe under this Act was the point where a non-integrated miner in the industry ordinarily shipped the product of his mine; not the point where the integrated miner-manufacturer shipped his final product (there sewer pipe). Since the fire clay was a product customarily sold in the form of a crude mineral product, this meant that the taxpayer could only include in his "ordinary treatment processes" the processes listed in Section 114(b)(4)(B)(iii) above. *U.S.* v. *Cannelton Sewer Pipe Co.,* 1960, 364 U.S. 76.

In order to resolve the cut-off point question for 1961 and future years, Congress in the Public Debt and Tax Rate Extension Act of 1960 (74 Stat. 290, 293) modified a provision of the 1954 Code, § 613(c). As amended, this statutory provision established specific cut-off points for numerous minerals, including those used in the manufacture of cement. This cut-off point for cement-producing minerals (except for preheating of the kiln feed) was established as being just prior to the introduction of the kiln feed into the kiln. This conformed to Revenue Ruling 290 of the Treasury Department, released in 1953, C.B. 1953-2, 41. This point is somewhere between the crushed limestone point and the finished cement point. This amendment was enacted three days after the *Cannelton* decision.

Since widespread litigation would apparently continue as to what was the proper cut-off point in the cement industry for the tax years prior to 1961, Congress encouraged settlement of such litigation by providing, on September 14, 1960, that cement producers could, within sixty days, elect the pre-kiln cut-off point for the taxable years prior to 1961. If the election was not made, their depletion allowances would be determined under "existing law." Public Law 86-781, 74 Stat. 1018; S.Rep. No. 1910, 86th Cong., 2d Sess., pp. 8-12.

Neither Monolith nor Midwest elected the pre-kiln cut-off point. Instead they preferred to continue the litigation as to whether the cut-off point to which they were entitled under "existing law" was the crushed stone, pre-kiln, finished cement, or other point.

Monolith

Monolith's cut-off point for the taxable year 1951 had already been determined in 1959 to be the finished cement. *Monolith Portland Cement Co.* v. *United States*, 9 Cir. 1959, 269 F. 2d 629, 631, wherein the court pointed out that the government did not there challenge such determination by the district court.

Passing on the next taxable year of 1952, the district court, in its findings and conclusions filed six months before the *Cannelton* decision, held that the 1951 determination was res judicata and constituted collateral estoppel on the question of the cut-off point. Not wishing, however, to rest its decision solely on that procedural ground, the district court also ruled on the merits that the cut-off point for the taxable year was the finished cement point.

This court affirmed. *Riddell* v. *Monolith Portland Cement Co.*, 9 Cir. 1962, 301 F. 2d 488 (with two of this present panel sitting). Some of the details surrounding this action, although not necessary to the disposition of the case as presently at bar, are there related. This court held

that *Cannelton* was distinguishable on the facts in that (1) it involved clay rather than limestone, and (2) that there was no commercial market for the limestone prior to its being made into finished cement. This court also held that since *Cannelton* was apparently not applicable to the cement industry, the "existing law" to which the Senate Report referred (as that under which non-electors' depletion cut-off points would be decided) must in cement cases be that which held that the cut-off point was "the finished cement." Moreover, this court referred to the policy against retroactive application of new judicial doctrine, as enunciated in *James* v. *United States*, 1961, 366 U.S. 213. As for the taxpayer's collateral estoppel and res judicata arguments, this court then stated that "[t]hough we might well agree with [them] . . . we too have preferred to go to the merits of the issues." (301 F. 2d at 498)

The Supreme Court summarily reversed on the certiorari papers alone, without allowing further briefs or oral argument. (371 U.S. 537) The Supreme Court held that *Cannelton was* controlling, and it pointed out that not only was crushed limestone "marketable in that form," in the words of *Cannelton*, but also that the record showed that it was actually sold in California in 1952 in an amount exceeding 1,500,000 tons and in the United States exceeding 216,000,000 tons. "We found the 'cut-off point where "gross income from mining" stopped has been the same' since the first depletion statute, namely 'where the ordinary miner shipped the product of his mine.'" (371 U.S. at 539) The Court then concluded: "The judgment [is] reversed, and the case is remanded for disposition in accordance with this opinion." There was no discussion in the Court's opinion of the "existing law," retroactivity, or the res judicata and collateral estoppel issues.

Because these issues had not been dismissed by the Supreme Court, the then-respondent Monolith filed a peti-

tion for rehearing pointing out this fact; and that upon a reversal by the Supreme Court "only legal points examined, discussed and decided by the Court are affected by the decision" (citing *Mutual Life Ins. Co.* v. *Hill*, 1904, 193 U.S. 551). It was suggested that therefore (as well as for other reasons), the Supreme Court might well reverse and remand to the court of appeals "with directions for 'proceedings in accordance with this opinion'", rather than a remand to the district court "for disposition in accordance with this opinion." Monolith's petition for rehearing was denied. 372 U.S. 932.

On the trial after remand, the district court judge entered new findings, conclusions, and judgment that the cut-off point was the crushed stone stage.

Monolith's appeal from that judgment is based on the argument that although the Supreme Court decided that *Cannelton* was controlling, it did not mention the "existing law," retroactivity, or collateral estoppel and res judicata issues. Thus, argues Monolith, the previous determinations of this court and/or of the district court on these issues are still the law of the case, and thus Monolith should still obtain its requested refund. We do not agree.

First, we think that the decision of the Supreme Court in the *Monolith* case demolishes these other arguments for Monolith. All four points go to the issue of whether the cut-off point for Monolith in 1952 was at "crushed stone," or at another point. That was the "case or controversy" facing the Supreme Court when it made its decision. Admittedly, the government, in its petition for a writ of certiorari, emphasized the *Cannelton* issue, with only a passing reference to the estoppel issue, and no reference to the retroactivity or "existing law" issues. (Opening Brief, Appendix, pp. 12-28.) But Monolith raised these other issues in its briefs in opposition to the petition for writ of certiorari, as independent grounds supporting the lower court decisions and thus made it unnecessary for the

court to consider the applicability of *Cannelton*. This was followed by the petition for rehearing hereinabove mentioned, where these other three grounds were again mentioned and urged. Because of these factors, we conclude that the arguments as to "existing law," retroactivity, and collateral estoppel and res judicata, to the extent those terms were used and/or relied upon by this court and by the district court in reaching our prior decisions in this case, were rejected by the Supreme Court.

Therefore, the judgment of the district court on remand from the Supreme Court, dismissing Monolith's suit for refund, must be, and is, *affirmed*.

Midwest

Midwest is a wholly-owned subsidiary of Monolith. Although Monolith's limestone quarries and cement manufacturing facilities are located in California, Midwest's are located near Laramie, Wyoming. The mining and manufacturing processes of Midwest are substantially identical to those of Monolith.

The district court entered its findings, conclusions, and judgment in the Midwest case after this court filed its opinion in the second *Monolith* case, 301 F. 2d 488, but before the Supreme Court filed its opinion reversing that second *Monolith* decision by this court. As such, the district court followed the opinion of this court at 301 F. 2d 488, as well as that court's own reasoning in its earlier opinions in both the first (168 F. Supp. 692) and second *Monolith* (unreported) cases.

The district court concluded that the cut-off point for Midwest for the taxable years 1951 and 1952 was the finished cement point. In so concluding, the district court reasoned:

> "The record shows that there are many different kinds and types of limestone. Unlike some minerals

> and mineral products, there is no 'national market' for 'limestone'. Instead, limestone is customarily produced for local markets. The national statistics of 'limestone sold or used' do not identify the different kinds and types and quantities of each which are sold in commerce." (C.T. 1297)

Apparently, the Supreme Court agreed no more with the district court than it did with this court, for in *Monolith* it *relied* on statistics in the Bureau of Mines Yearbook relating to "limestone sold or used in the United States" to reverse this court. The Supreme Court's opinions in *Monolith* and *Cannelton* hold that the cut-off point is established at that point in the processing "where the ordinary miner shipped the product of his mine;" "where the mineral first became suitable for industrial use or consumption." *Riddell* v. *Monolith Portland Cement Co.*, 371 U.S. at 538, 539. Yet it is not easy to be sure just what is the applicable "market," for the Supreme Court in *Monolith* referred both to the amount (tonnage) of limestone "sold or used" in the United States, and the amount "actually sold in California in 1952" (n. 2, p. 539).

We express no opinion as to what is the applicable market. But we are, obviously we think, required to remand the *Midwest* case to the district court for further proceedings in the light of the subsequent opinions of the Supreme Court and of this court in *Monolith*.

The *Monolith* case is *affirmed;* the *Midwest* case is *remanded* for further proceedings.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,776

MONOLITH PORTLAND CEMENT COMPANY, *Appellant*,

v.

R. A. RIDDELL, District Director of Internal Revenue, Los Angeles District, *Appellee*.

Judgment

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 22, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 938

MONOLITH PORTLAND CEMENT CO., PETITIONER

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, LOS ANGELES DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is an income tax case involving the percentage depletion allowance (a given percentage, here 10 percent, of the "gross income from mining") and, more precisely, the scope of "mining" as statutorily defined for depletion purposes. In 1962, the court below held that "mining" included all of the processes employed by the taxpayer in manufacturing finished cement. 301 F. 2d 488; R. 749–772. We regarded this holding as contrary to *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76, and petitioned for a writ of certiorari. The Court granted the petition and summarily reversed the court below (371 U.S. 537; R. 774–776),

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holding that "mining" terminated when the limestone reached the crushed stage and that "This results in limiting the taxpayer's basis for depletion to its constructive income from crushed limestone, rather than from finished cement" (R. 776). The case was accordingly remanded to the District Court for disposition in accordance with the Court's opinion (R. 773, 776).

On remand, the district court denied petitioner's refund claim (R. 828–831). The taxpayer again appealed to the Ninth Circuit claiming that it was entitled to judgment, notwithstanding this Court's decision, on various grounds of statutory construction and collateral estoppel which, it contended, were not decided by this Court. On the second appeal the court below pointed out that these matters had been called to this Court's attention in Monolith's brief in opposition and in a petition for rehearing and concluded that the taxpayer's arguments both as to statutory construction and as to collateral estoppel had been rejected by this Court in deciding the merits of the depletion issue. The taxpayer thereupon filed the instant petition for certiorari, contending that this Court's mandate has been misconstrued and that it is entitled to a hearing on the "remaining issues" in the case.

1. It is entirely clear that the so-called "remaining issues" as to statutory construction are the very issues decided by this Court in *Riddell* v. *Monolith Portland Cement Company,* 371 U.S. 537. First, petitioner contends that, when Congress enacted Public Law

86–781, 74 Stat. 1017, 1018 in 1960, allowing cement manufacturers to elect to apply to past years a new statutory base for depletion, the legislative history explained that those not so electing would be governed by "existing law." Petitioner contends that this legislative history amended the statute to give non-electors the benefit of certain pre-*Cannelton* decisions in the circuit courts which held that finished cement was the cutoff point for mining. In deciding that Monolith's cutoff point was crushed limestone, this Court obviously rejected the contention and determined with finality the very issue that petitioner asked the Ninth Circuit to re-examine.[1]

The other issue of statutory construction which petitioner says remained open after this Court's decision was, for identical reasons, decided by the Court. Relying upon an alleged principle of "non-retroactivity" of decisions as to civil tax liability, the taxpayer contends that the *Cannelton* decision should only be given prospective effect (Pet. 10). But this contention was obviously rejected by this Court in determin-

[1] Petitioner's contention was very plainly without merit. The legislative history did not amend the statute; it meant what it said—that there was no change in the law for non-electors and "existing law" continued in effect for them. Moreover, notwithstanding certain erroneous lower court decisions which controlled in the Ninth Circuit, in deciding *Monolith* this Court was not making new law but restating existing law. As the Court had said in *United States* v. *Cannelton Sewer Pipe Company*, 364 U.S. 76, 87, "ever since the first percentage depletion statute, the cut-off point where 'gross income from mining' stopped has been the same, *i.e.*, where the ordinary miner shipped the product of his mine."

ing that Monolith's cutoff point for depletion should be determined in the same way that Cannelton's cutoff point was determined—*i.e.*, for both it is the point at which "the ordinary miner shipped the product of his mine."

In short, the Ninth Circuit correctly held that both of the issues of statutory construction urged by petitioner have necessarily been resolved against it by this Court.

2. It is far less clear that in its *Monolith* decision this Court rejected the taxpayer's contention that the doctrine of collateral estoppel entitled it to use the same cutoff point for the tax year 1952 as the lower courts had allowed it for the year 1951. This Court need not, of course, pass upon grounds for sustaining a decision below which were not reached and decided by the lower court. It is free either to decide such issues or to leave them for later resolution by the lower courts on remand. The opinion in *Riddell* v. *Monolith Portland Cement Company, supra,* does not mention the issue of collateral estoppel, although it was urged by Monolith in its brief in opposition and petition for rehearing. If the Court now concludes that this issue was not determined by its prior decision. it may wish to vacate the judgment below and remand for consideration by the Ninth Circuit. We believe that this disposition is unnecessary and undesirable, however, because petitioner's claim of collateral estoppel is patently contrary to a controlling decision of this Court, as well as to universally accepted doctrine.

Monolith's sales of limestone in 1951 are plainly separate transactions from its sales of limestone in 1952, although the two groups of sales may be virtually identical in all material respects. It is established that the doctrine of collateral estoppel does not apply to an issue of law decided in litigation arising out of a separate transaction between the parties. The question as to the cutoff point of "mining" for depletion purposes is indisputably such a question of law. See *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76. This is conclusive of petitioner's claim of collateral estoppel.

The principles applicable to collateral estoppel in federal tax litigation have been authoritatively set forth in *Commissioner* v. *Sunnen*, 333 U.S. 591. There the court made unmistakably clear that "if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which occur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue * * *. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." 333 U.S. at 601–602. Since it is

evident that the sales of limestone on which depletion was claimed in 1952 did not involve "the same set of events or documents" as were involved in the sales in 1951, the doctrine of collateral estoppel is inapplicable.

The reasons for the rule adopted in *Sunnen* and controlling here are set forth not only in the *Sunnen* opinion but also in the *Restatement of the Law of Judgments,* which also makes clear that collateral estoppel does not apply to questions of law "except where both causes of action arose out of the same subject matter or transaction." Section 70. After illustrating the principle by noting that a determination that a particular customs classification is applicable to one importation is not conclusive in a subsequent action brought by the government for the recovery of duties on a subsequent importation of an identical article, the *Restatement* explains that "it would obviously be unjust to apply one rule to one importer on the ground that the question of law was *res judicata* as to him and to apply a different rule to other importers." *Restatement,* 1948 Supp., Comment f. Similarly, it would obviously be unjust to continue to apply one rule of law to determine Monolith's depletion allowance for years after 1951 and to apply a different rule of law to all other taxpayers. These policies are particularly applicable in a case such as this where a subsequent decision of this Court has made it clear that the taxpayer has erroneously obtained an advantageous ruling on a question of law in one year and is attempting to

perpetuate the advantage despite an intervening decision which makes the error of the early holding clear and makes that holding unavailable to other taxpayers. The doctrine of collateral estoppel, in short, does not create a private body of law for determining the legal consequences of separate future transactions between the same two parties. See Scott, *Collateral Estoppel by Judgment,* 56 Harv. L. Rev. 7–10, and *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 843–845.

Since we believe that no useful purpose would be served by granting the petition in order to resolve "the purely procedural" question which the taxpayer presents, we respectfully submit that the petition should be denied.

ARCHIBALD COX,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 938

MONOLITH PORTLAND CEMENT CO., *Petitioner*,

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, LOS ANGELES DISTRICT, *Respondent*.

REPLY TO MEMORANDUM IN OPPOSITION

WILLIAM A. SUTHERLAND
JEROME B. LIBIN
900 - 17th Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY TO MEMORANDUM IN OPPOSITION

The Government's Memorandum in Opposition is deserving of special comment on several counts.

First, and most significantly, the Memorandum tacitly acknowledges the validity of petitioner's claim that the *collateral estoppel issue* was *not* properly before this Court and was *not* decided by it. In view of this tacit admission, as well as the Government's inability to offer any justification whatever for the action taken by the court below with respect to the collateral estoppel issue, it seems beyond dispute that petitioner

is entitled, at the very least, to have the decision below vacated and the case remanded for consideration of this issue.

All that the Government can offer by way of opposition to a remand of the case on this ground is its view that the collateral estoppel issue would be decided in its favor by the lower courts, thus making a remand appear "unnecessary and undesirable." Although we strongly disagree with the Government's view as to merits of the collateral estoppel issue, we have already pointed out in our petition for certiorari that a discussion of the merits of this issue, or of any other issue, is irrelevant at this stage of the proceedings. The only question here involved—whether the losing party in a prior proceeding in this Court is on remand entitled to a hearing on issues which admittedly remain in the case—surely cannot be made to turn on a mere assertion by the party here victorious that such issues would also be decided in its favor if a hearing were to be held.

As our petition for certiorari points out, this Court's own rules and decisions, as well as a decision by the Court of Appeals for the District of Columbia Circuit, make it clear that on remand of a case such as this one, a full hearing *must* be permitted on those issues which were not properly presented to this Court for decision and which were admittedly not decided by it. Indeed, the Government's conspicuous failure to defend the reasoning and action of the court below in denying petitioner a hearing on the collateral estoppel issue conclusively confirms the validity of petitioner's claim that the court below acted in an arbitrary and totally unjustifiable manner in this regard.

Next, with respect to the "prospective only" and "existing law" issues, the Government takes a different

tack. In contrast to its position regarding the collateral estoppel issue, the Government asserts that these issues were in fact decided by this Court. Again, however, the Government ignores the unquestioned application of this Court's Rule 23, which makes it unmistakably clear that questions not properly presented in a petition for certiorari will not even be considered by this Court.

As has been shown, the "existing law" and "prospective only" issues were completely omitted from the Government's prior petition for certiorari. Only the single question of pure statutory construction was presented.* It seems apparent that, in thus narrowing its petition, the Government deliberately streamlined the case in the hope that this Court would act on the certiorari papers alone and summarily decide the single issue of statutory construction which was the real point of interest to the Government. That, of course, is precisely what this Court did.

In this light, it is difficult to understand how the Government can now argue that this Court's summary

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* The Government now seeks to gloss over this fact by referring to the "existing law" and "prospective only" issues as "issues of statutory construction." (Govt. Mem. p. 4.) It should be clear, however, that neither the "existing law" nor the "prospective only" issue is in any way a part of the statutory construction question previously presented to this Court. Rather, both of these issues arise only *because* of the construction placed upon the applicable statute by this Court, and present the question whether, *notwithstanding that construction*, other mitigating factors dictate in favor of a different result in this particular case.

Moreover, as our petition for certiorari points out, under Rule 24, as well as under this Court's decision in *Namet* v. *United States*, 373 U.S. 179, Monolith's reference to the "existing law" and "prospective only" issues in its brief in opposition could not have placed them before this Court.

opinion somehow decided the "existing law" and "prospective-only" issues as well. Under Rule 23, those issues were not properly before the Court, and, in any event, there is not a single word in the Court's opinion which suggests that they were even considered, let alone decided.

While the question presented by our petition is indeed a procedural one, it is vitally important. It involves the unjustified and unwarranted action of a lower federal court in ignoring this Court's prior mandate and in depriving petitioner of a hearing on the remaining issues in this case, at least one of which even the Government admits has never been finally decided. The action taken by the court below is in direct conflict with this Court's own rules and decisions, as well as with a decision by the Court of Appeals for the District of Columbia Circuit—conflicts which the Government itself does not deny—and represents a gross departure from the accepted and usual course of judicial proceedings. Such action constitutes a dangerous precedent, and should not be permitted to stand uncorrected.

Accordingly, the decision below should be vacated and the case remanded to the Distric Court for further proceedings which would permit a full consideration of the remaining issues in this case.

Respectfully submitted,

WILLIAM A. SUTHERLAND
JEROME B. LIBIN
900 - 17th Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner.